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May 29, 2019

Via ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation, CG Docket No. 17-59, WC Docket No. 17-97

Dear Ms. Dortch:

PRA Group, Inc.,[1] by counsel, hereby submits this letter in response to the draft *Declaratory Ruling* scheduled to be considered by the Commission on June 6, 2019, in the above-referenced dockets.[2]

PRA strongly supports efforts to eliminate fraudulent and other illegal robocalls. However, those efforts cannot and should not come at the expense of legitimate, lawful calls. When call labeling and blocking are not appropriately tailored to prevent the completion of only illegal calls, they impede entities from operating their businesses and reaching consumers, and they prevent consumers from receiving many of the calls they want, need, and expect to receive.

Overbroad call mislabeling and blocking has been a serious, ongoing problem since the Commission's *November 2017 Call Blocking Order*,[3] which authorized voice service providers to block a subset of "illegal robocalls in certain, well-defined circumstances."[4] Yet since that time, a meaningful volume of PRA's lawful live voice calls — and, as the record reflects, the lawful calls of many others — have been mislabeled as suspect and thus have been blocked. This has

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[1] PRA Group, Inc. is the publicly traded parent company of Portfolio Recovery Associates, LLC ("PRA"), a leader in debt collection that employees over 3,500 people.

[2] *Advanced Methods to Target and Eliminate Unlawful Robocalls*, Declaratory Ruling and Third Further Notice of Proposed Rulemaking, FCC-CIRC1906-01, CG Docket No. 17-59, WC Docket No. 17-97 (May 16, 2019) ("draft *Declaratory Ruling*").

[3] *Advanced Methods to Target and Eliminate Unlawful Robocalls*, Report and Order and Further Notice of Proposed Rulemaking, FCC 17-151, CG Docket No. 17-59 (Nov. 17, 2017) ("*November 2017 Call Blocking Order*").

[4] *Id.* ¶ 9.

impeded PRA's operations and has prevented the company from reaching consumers to inform them of their obligations and work with them to find ways to repay their debts. It also has required PRA to undertake substantial efforts (and incur substantial costs) in an attempt to rectify the problem.

Despite these efforts, PRA continues to see a substantial volume of its lawful live voice calls mislabeled and blocked, and it is into this environment that the Commission now will be considering the draft *Declaratory Ruling* — a decision that is certain to exacerbate the situation by allowing calls not only to continue to be mislabeled but also to now, when suspected of being illegal or "unwanted" on the basis of "*any* reasonable analytics," to be blocked by default.[5] This boundless license for voice service providers invariably will result in the widespread blocking of an even greater volume of lawful calls, including live voice calls that are not the target of the Commission's stated objective. This result will contravene the Communications Act, conflict with Commission precedent, and undermine a core Commission objective: ensuring that all subscribers can make and receive lawful calls without interruption. By allowing sweeping, overbroad blocking measures and omitting protections for lawful callers whose calls will be improperly mislabeled or blocked, the draft *Declaratory Ruling* will deprive voice service subscribers — callers and call recipients alike — of the service on which they depend and pay to receive.

PRA agrees that *illegal* robocalls are a problem, and it applauds the Commission for seeking to address them. But any solution to the illegal robocall problem must grapple with the facts and data in the record and interpret the law rationally. In light of the infirmities in the draft *Declaratory Ruling* and the failure of the Commission to provide adequate notice of its approach, PRA strongly encourages the Commission to withdraw the draft from consideration and use the record in this proceeding to develop cogent and supportable solutions to the problem of illegal robocalls that do not have the collateral effect of blocking the transmission or receipt of lawful calls.

I. The Record Demonstrates that Current Call Mislabeling Practices Result in the Widespread Blocking of Legitimate, Lawful Calls.

The record in this proceeding makes it clear that if the draft *Declaratory Ruling* takes effect it will result in the blocking of lawful calls, including live voice calls. In November 2017, the Commission authorized carriers to take limited steps to block illegal robocalls. That blocking authority was restricted to clearly defined categories of calls highly likely to be illegal.[6]

Despite the narrow scope of the *November 2017 Call Blocking Order*, and despite the fact that it was intended to address only illegal robocalls, since that order took effect a meaningful volume of PRA's lawful live voice calls have been subject to mislabeling by carriers and, as a result, inappropriate and overbroad call blocking practices. Indeed, after the

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[5] Draft *Declaratory Ruling* ¶ 33 (emphasis added).

[6] *November 2017 Call Blocking Order* ¶ 9 (limiting call blocking to specific circumstances).

November 2017 Call Blocking Order took effect, the average number of calls PRA needed to make to reach a single consumer increased by nearly four times. This is because in the wake of the *November 2017 Call Blocking Order*, vendors and technologies used by voice service providers have been misconstruing PRA's live voice calls as illegal robocalls (due to certain benign characteristics they sometimes happen to share with some types of illegal robocalls, such as large bursts of calls in short timeframes, low average call durations, and low call completion rates) and mislabeling them as "robo caller," "potential fraud," "scam likely," "suspected spam," "potential spam," and the like. This has resulted in PRA's legitimate calls inappropriately being blocked by carrier- and consumer-side blocking technologies. PRA has attempted to mitigate this problem by engaging multiple vendors of its own to work with voice service providers to prevent inappropriate mislabeling and blocking from occurring. But even after taking these steps and incurring substantial costs as a result, the average number of calls needed for PRA to connect to a consumer currently is still three times higher what it was before the *November 2017 Call Blocking Order* took effect. This has increased PRA's operational costs considerably.

PRA's experience is not unique. The lawful calls of other commercial and non-commercial entities are being mislabeled and unlawfully blocked, too, as demonstrated in multiple filings in the docket.[7] Indeed, just last week, Numeracle reported that one Fortune 100 cable and Internet provider had 55 of its outbound numbers — which accounted for 72% of its call volume — mislabeled as spam (and thus presumably blocked) under the Commission's current call blocking regime.[8]

Other entities have aptly cautioned that the problem will get worse if the Commission authorizes the blocking practices condoned by the draft *Declaratory Ruling*. For example, Microsoft recently explained that "permit[ting] call blocking on an opt-out basis would likely result in legitimate calls being blocked inadvertently, including calls that are important to the well-being of consumers."[9] Indeed, yesterday a group of trade associations representing a wide range of industries explained that if the Commission enacts the draft *Declaratory Ruling* next

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[7] *See, e.g.*, Comments of Sirius XM Radio Inc., *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, at 6–7 (Jan. 23, 2018); Comments of American Bankers Association, *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, at 2–3 (Aug. 17, 2018); Comments of AARP, *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, at 2 (July 3, 2017); Comments of Microsoft Corporation, *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, at 6–7 (July 3, 2017).

[8] Numeracle, Notice of *Ex Parte* Communication, CG Docket No. 17-59, WC Docket No. 17-97 (May 22, 2019) ("Numeracle *Ex Parte*"). Even if these calls were not blocked, mislabeling them as spam has the same practical effect, as that label discourages consumers from answering them.

[9] Microsoft, Notice of *Ex Parte* Communication, CG Docket No. 17-59 and related proceedings, at 2 (May 20, 2019).

week "[p]ublic safety alerts, fraud alerts, data security breach notifications, healthcare reminders, and power outage updates, among others, all could be inadvertently blocked."[10]

PRA shares these concerns. The record in the dockets in which the draft *Declaratory Ruling* will be considered is replete with examples of inappropriate mislabeling and blocking practices that already are occurring without adequate recourse to callers and consumers. There can be little question that, despite the best of intentions, the draft *Declaratory Ruling* will, if adopted, only make this problem worse.

II. The Draft Declaratory Ruling Is Unlawful and Contrary to Precedent.

The draft *Declaratory Ruling* exceeds the Commission's statutory authority. The Commission can act only pursuant to an express delegation of authority from Congress.[11] Indeed, the Commission's current leadership repeatedly has cited and embraced this principle.[12] Yet the draft *Declaratory Ruling* does not cite an express delegation of authority for default call blocking.

Instead, the draft *Declaratory Ruling* attempts to justify the Commission's action by arguing that default blocking by voice service providers does not contravene the Communications Act because *consumers* have the right to block calls.[13] But it does not follow that merely because *consumers* have the right to block calls, voice service providers (and especially telecommunications service providers, which are common carriers) can exercise that right without consumer consent — or indeed in the absence of any action by the consumer whatsoever. Tellingly, the draft *Declaratory Ruling* cites no authority for such a proposition. It

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[10] American Bankers Association, *et al.*, Notice of *Ex Parte* Presentations, CG Docket Nos. 02-278, 17-59, 18-152, WC Docket No. 17-97, at 1 (May 28, 2019) ("Associations *Ex Parte*").

[11] *See La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (A federal agency "literally has no power to act . . . unless and until Congress confers power upon it."); *Comcast Corp. v. FCC*, 600 F.3d 642, 654 (D.C. Cir. 2010).

[12] *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, 313 ¶ 4 (Jan. 4, 2018) (where the Commission has "not identified any sources of legal authority that could justify" its rule, it cannot act); *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5975 (2015) (Dissenting Statement of then-Commissioner Pai) (where "Congress did not delegate substantive authority to the FCC" to regulate under a given provision, "the agency's attempt to adopt" a rule under such provision "must fail"); *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Report and Order, 31 FCC Rcd 13911, 14124 (Dissenting Statement of Commissioner O'Rielly) ("The FCC is not empowered to supplement its own authority, even if it believes it has policy reasons to do so.").

[13] Draft *Declaratory Ruling* ¶¶ 22, 30.

merely makes the unsupported assertion that because *consumers* can consent to call blocking, call blocking initiated *by their service providers* on an opt-out basis is not an "unjust and unreasonable practice" in violation of Section 201(b) and does not result in an "impairment of service" in violation of Section 214(a).

That is not — and cannot be — true. The Commission's *November 2017 Call Blocking Order* permits voice service providers to block clearly defined categories of calls highly likely to be illegal — *i.e.*, calls that purport to be from invalid, unallocated, or unused numbers, or calls that appear to originate from a number on a "Do-Not-Originate" list.[14] The Commission cited sections 201 and 202 of the Act in that decision as the basis for its authority to allow such blocking.[15] Those provisions require "[a]ll charges, practices, classifications, and regulations for and in connection with . . . communication service [to] be just and reasonable" and prohibit carriers from engaging in "unjust or unreasonable discrimination in [their] charges, practices, classifications, regulations, facilities, or services."[16]

Even if it was reasonable for the Commission in November 2017 to rely on sections 201 and 202 to permit carriers to block calls that purport to be from invalid, unallocated, and unused numbers (because, by not originating from authorized numbers, such calls arguably are illegal and blocking them presumably could be just and reasonable), this same rationale cannot possibly apply to default call blocking based on "any reasonable analytics"[17] when the record is clear that such an approach will result in widespread blocking of *lawful* calls.

The Commission's reliance on section 214(a) as a basis for its draft *Declaratory Ruling* is even more inapt. Section 214(a) states that a carrier may not "impair" service to a community or even to part of a community unless the Commission determines that "neither the present nor future public convenience and necessity will be adversely affected" by the impairment.[18] The draft does not make such a determination, and it is implausible that the Commission could do so given the record evidence that the mechanisms currently in use to label and block just a narrow category of illegal calls (and that presumably will be expanded if the draft takes effect) already result in the blocking of a broad range of legal calls as well.

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[14] *November 2017 Call Blocking Order* ¶¶ 1, 9.

[15] *Id.* ¶ 60. The Commission also cited the Truth in Caller ID Act and its Section 251(e) numbering authority as bases for its action given that it was authorizing call blocking only for calls purporting to be from certain numbers (specifically, invalid, unallocated or unused numbers). *Id.* ¶¶ 61-62.

[16] 47 U.S.C. §§ 201, 202.

[17] Draft *Declaratory Ruling* ¶ 33.

[18] 47 U.S.C. § 214.

The Commission likewise lacks statutory authority to allow the default blocking of "unwanted" calls. The draft *Declaratory Ruling* states that providers may block "unwanted" calls by default, but it does not indicate whether this set of calls is broader or different than "unlawful" calls. At times the draft refers to "illegal *or* unwanted calls," suggesting that the two are distinct.[19] To the extent the draft *Declaratory Ruling* permits blocking of unwanted but nevertheless lawful calls, the draft is *ultra vires*. The Commission cites no statutory authority to intercept such calls, and none exists. Indeed, it is well settled that the absence of a prohibition in a statute does not equal a grant of authority to regulate.[20] Allowing providers to block "unwanted" calls by default would be particularly inappropriate because determining whether a call is unwanted is inherently subjective. Under the draft *Declaratory Ruling*'s default framework, providers may block calls without any indication from the recipient that a call is unwanted, and indeed without any action whatsoever on the subscriber's part.

The draft *Declaratory Ruling* also violates the Communications Act and Commission precedent in other ways. For instance, the draft permits "voice service providers" to block calls by default, and it includes in the definition of voice service providers "traditional wireline and wireless carriers."[21] Under the Communications Act and Commission precedent, traditional wireline and wireless carriers are "telecommunications carriers" and thus common carriers.[22] For decades, common carriers have been required to adhere to certain statutory and regulatory safeguards, including sections 201 and 202 of the Communications Act, as noted above. Authorizing them to block calls in a manner that will ensnare lawful calls would violate these provisions and this precedent.

Although the Commission held in November 2017 that providers may block a clearly defined set of calls that are highly likely to be illegal, the Commission has never authorized common carriers to exercise discretion in a manner that would lead to the blocking of *lawful* calls. To the contrary, by its own acknowledgement, the "Commission has previously found call blocking, with limited exceptions, [to be] an unjust and unreasonable practice under section 201(b) of the" Communications Act.[23] In the *November 2017 Call Blocking Order*, the

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[19] Draft *Declaratory Ruling* ¶ 37 (emphasis added).

[20] *See, e.g., FAG Italia S.p.A. v. United States*, 291 F.3d 806, 816 (Fed. Cir. 2002) ("It is indeed well established that the absence of a statutory prohibition cannot be the source of agency authority." (citing *S. Cal. Edison Co. v. FERC*, 195 F.3d 17, 24 (D.C. Cir. 1999))).

[21] Draft *Declaratory Ruling* ¶ 2 n.1.

[22] 47 U.S.C. § 153(51) ("A telecommunications carrier shall be treated as a common carrier . . . .").

[23] *See November 2017 Call Blocking Order* ¶ 8 & n.23 (listing orders); *see also Establishing Just & Reasonable Rates for Local Exch. Carriers*, Declaratory Ruling and Order, 22 FCC Rcd 11629, 11631 ¶ 5 (2007).

Commission noted it has "allowed call blocking only in 'rare and limited circumstances.'"[24] The Commission fails to adequately explain why it would be reversing course now.[25]

The Commission attempts to downplay the consequences of its draft *Declaratory Ruling*, asserting that is it merely seeking to "clarify" that carriers may offer opt-out call blocking and "resolve uncertainty" on this topic.[26] But the Commission has previously made clear in no uncertain terms that "a provider that blocks calls that do not fall within the scope [of the bases for blocking calls outlined in the *November 2017 Call Blocking Order*] may be liable for violating the Commission's call completion rules."[27] The draft *Declaratory Ruling* represents a sea change, not a clarification.[28]

III. The Commission Failed to Provide Fair Notice.

The draft *Declaratory Ruling* is untethered from the Further Notice of Proposed Rulemaking ("2017 FNPRM") that accompanied the *November 2017 Call Blocking Order*, which sought "comment on two discrete issues:" (1) "potential mechanisms to ensure that erroneously blocked calls can be unblocked as quickly as possible and without undue harm to callers and consumers" and (2) "ways [the Commission] can measure the effectiveness of [its] robocalling efforts."[29] The draft *Declaratory Ruling* and its boundless approach to default call blocking — without any mention of "mechanisms to ensure that erroneously blocked calls can be unblocked" — is not a logical outgrowth of the limited issues enumerated in the 2017 FNPRM.[30]

The only notice of any proposed changes beyond those identified in the 2017 FNPRM was a later request from the Consumer and Governmental Affairs Bureau in 2018 to "refresh the

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[24] *November 2017 Call Blocking Order* ¶ 8.

[25] *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–15 (2009); *Motor Vehicle Manufacturers Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

[26] Draft *Declaratory Ruling* ¶¶ 25, 30.

[27] *November 2017 Call Blocking Order* ¶ 9.

[28] *See Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1108 (D.C. Cir. 2014) ("The hospitals should not be held to have anticipated that the Secretary's 'proposal to clarify' could have meant that the Secretary was open to reconsidering existing policy.").

[29] *November 2017 Call Blocking Order* ¶¶ 57, 59.

[30] *See, e.g., Allina Health Servs.*, 746 F.3d at 1107; *Daimler Trucks N. Am. LLC v. EPA*, 737 F.3d 95, 100 (D.C. Cir. 2013).

record."[31] That request did not mention the possibility of default blocking of legal or "unwanted" calls. Rather, the request to refresh the record specifically disclaimed such a possibility: "To be clear, we seek comment regarding identification of *illegal* calls, not other calls, *e.g.*, those that are unwanted but legal."[32] On the basis of either of these notices, there is no way that "all interested parties 'should have anticipated'" the novel approach embraced by the draft *Declaratory Ruling*.[33]

The only way for the Commission to depart so dramatically from the limited notice that it provided previously was to issue a revised notice and provide parties with an appropriate interval to comment. Indeed, "[a]n agency adopting final rules that differ from its proposed rules is required to renotice when the changes are so major that the original notice did not adequately frame the subjects for discussion. The purpose of the new notice is to allow interested parties a fair opportunity to comment upon the final rules in their altered form."[34] The Commission failed to do that, and on that ground alone the Commission should not adopt the *Declaratory Ruling*.[35]

IV. The Draft Declaratory Ruling Fails to Address the Effect of Default Blocking on Lawful Calls.

The draft *Declaratory Ruling* errs by granting providers essentially unbound discretion to block calls they deem unlawful or unwanted, permitting carriers to block calls "based on any reasonable analytics designed to identify unwanted calls."[36] The draft later describes the types of unwanted calls that presumably could be blocked using such "reasonable analytics" to include

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[31] *Consumer and Governmental Affairs Bureau Seeks to Refresh the Record on Advanced Methods to Target and Eliminate Unlawful Robocalls*, Public Notice, CG Docket No. 17-59, DA 18-842 (Aug. 10, 2018).

[32] *Id.* at 2 n.6 (emphasis in original).

[33] *Protecting and Promoting the Open Internet*, 30 FCC Rcd at 5938 (Dissenting Statement of then-Commissioner Pai) (emphasis omitted) (quoting *N.E. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) (per curiam)).

[34] *Id.* at 5941 (Dissenting Statement of then-Commissioner Pai) (quoting *Conn. Light & Power Co. v. Nuclear Regulatory Commission*, 673 F.2d 525, 533 (D.C. Cir. 1982)).

[35] The D.C. Circuit recently held that providing notice in the form of a draft order, as the Commission has done here, is inadequate. *Nat'l Lifeline Ass'n, et al. v. FCC*, 921 F.3d 1102, 1117 (D.C. Cir. 2019) (finding the two-week period between issuance of the unpublished draft order and the date of a public notice cutting off lobbying to be inadequate for eliciting meaningful comments).

[36] Draft *Declaratory Ruling* ¶ 33.

"large bursts of calls in a short timeframe; [calls with a] low average call duration; [and calls with] low call completion ratios," among others.[37]

As previously noted, these are precisely some of the same qualities that can and do accompany *lawful* calls, including those transmitted by PRA and others.[38] The Commission should restrict providers to criteria that are primarily or exclusively associated with illegal robocalls, and permit a broader set of considerations only if a provider demonstrates that (a) the criteria chosen are insufficient to prevent illegal robocalls *and* (b) employing a broader set of criteria would not result in increased blocking of lawful calls.

The draft *Declaratory Ruling* inexplicably omits protections for parties whose lawful calls are improperly blocked. While the draft *Declaratory Ruling* includes express protections for emergency calls,[39] it omits similar protections for other classes of lawful calls that are likely to be ensnared by the same analytics the draft *Declaratory Ruling* blesses, such as calls from financial institutions, schools, civic organizations, public opinion researchers, and political campaigns. There is no good reason for that omission. At a minimum, the Commission should require service providers to (a) demonstrate that the analytics they use to block unlawful calls will not result in the blocking of lawful calls, (b) implement a process to complete and permanently white list lawful calls immediately upon receiving a report of improper blocking, and (c) require providers to compensate calling parties and consumers who are adversely affected by the blocking of lawful calls. As discussed above, in its 2017 FNPRM, the Commission expressly acknowledged the importance of establishing "mechanisms to ensure that erroneously blocked calls can be unblocked as quickly as possible."[40] The Commission's failure to do so here further warrants its withdrawal of the draft *Declaratory Ruling* from consideration.[41]

Finally, the draft *Declaratory Ruling* relies on a flawed cost-benefit analysis. The draft embraces a handful of figures in the record to calculate the benefit of blocking illegal calls at a floor of $3 billion.[42] It then cites costs that will be incurred by service providers to implement

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[37] *Id.* ¶ 34.

[38] *See* Associations *Ex Parte* at 2.

[39] Draft *Declaratory Ruling* ¶ 35.

[40] *November 2017 Call Blocking Order* ¶ 57.

[41] Although the Commission asserts that "the ability for consumers to opt out of call-blocking programs adequately addresses" concerns about improper blocking of lawful calls, draft *Declaratory Ruling* ¶ 33, that assertion is inconsistent with the draft's observations just a few paragraphs earlier that "[i]nertia may be an obstacle for many consumers" and "convincing consumers to affirmatively sign up for a [given] program . . . can be a costly endeavor," *id.* ¶ 28.

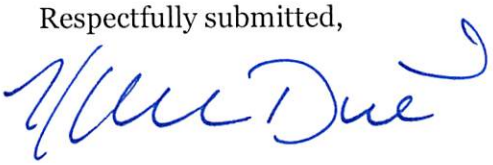
[42] This figure assumes a benefit of ten cents per blocked illegal call without citing to any support or justification for that figure. *See id.* ¶ 38–39.

"reasonable analytics" to block calls, but provides no specific figures. The draft *Declaratory Ruling*'s calculations also fail to account for — or even acknowledge — the cost of legitimate calls being blocked by providers. That cost is likely to be substantial given the evidence outlined above and in the record. Indeed, based on its experience to date, PRA estimates that if the draft *Declaratory Ruling* is adopted, the value of the harm it will suffer as a result of the increased blocking of its lawful calls could amount to tens of millions of dollars.[43] Other legitimate callers are likely to suffer similar, meaningful, and costly harms; and consumers, too, are likely to suffer harms based in part on the wanted calls they do not receive. There simply is no basis for the Commission to rationally conclude that the benefits of the draft *Declaratory Ruling* outweigh its costs.

PRA shares the Commission's desire to eliminate the problem of illegal robocalls. But doing so cannot and should not come at the expense of lawfully placed calls. The Commission is right to be concerned that if high volumes of illegal robocalls persist, businesses and consumers will be deprived of the full value of the voice network on which they rely. But the same is true if businesses and consumers cannot reliably transmit or receive lawful calls. The Commission should withdraw its draft *Declaratory Ruling* from consideration and instead continue to seek effective solutions to the unlawful robocall problem through its rulemaking proceeding, which is the appropriate regulatory mechanism for effectuating the policies envisioned.

Any questions concerning this transmission should be addressed to the undersigned.

Respectfully submitted,



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[43] These increased costs ultimately would be borne by consumers in the form of higher rates for credit.